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IN THE

SUPREME COURT OF THE UNITED STATES

78-407

NO. 73_____

RICHARD A. LAUCHLI, JR.,

versus

UNITED STATES, etc., et al,

USCA-7 CASE NUMBERS: 72-1247
72-1251
72-1355
72-1401
72-1433

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS OF COURTS BELOW

The opinions of the courts below are unreported but are attached as an appendix hereto.

A Motion for Extension of Time in which to file this petition was denied by Mr. Justice Rehnquist on August 2, 1973 in these words:

> "Denied without prejudice to such right as petitioner may have to file under 28 U.S.C. 2101(c)."

28 United States Code, Section 2101(c) would, of course, make all five of these cases timely filed.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit issued its final Order in No. 72-1355 on June 7, 1973. That same court issued its final Order in Nos. 72-1247, 72-1401, and 72-1433 on July 6, 1973. While it was believed that the same court had issued its final Order in No. 72-1251 on June 7, 1973, subsequent events brought about a non-compliance by the United States with that Order has caused the Court of Appeals to issue further Orders in this matter. Thus the final Order may well still be in the offing.

The Orders and Opinions of the Court of Appeals for the Seventh Circuit are attached hereto as an appendix.

Richard A. Lauchli, Jr. elects to proceed under Rule 23.3 of this Court and combine the five cases cited herein for the reason that they are all closely related as will be shown later in this document. (See also, page 1 of Motion for Enlargement of Time submitted July 5, 1973).

Jurisdiction of this Court is conferred by Article III, Section 2 of the Constitution of the United States which states (in pertinent part):

"In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions and under such regulations as the Congress shall make."

Congress conferred jurisdiction upon the Supreme Court by 28 United States Code, Section 1254 (1) which states (in pertinent part):

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By the Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Further, jurisdiction is conferred by Congress under 28 United States Code, Section 1651(a) which states: (in pertinent part):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

QUESTIONS PRESENTED FOR REVIEW

I

May the United States, via the Federal Firearms Act[1] the National Firearms Act[2] and the National Gun Control Act of 1968 confiscate firearms and firearms accoutrements of a purely military nature while prosecuting Richard A. Lauchli, Jr.[3] for possession, manufacturing, and dealing in these commodities without infringing on the Second Amendment of the Constitution of the United States right of the people to keep and bear arms?

II

May the United States seize and keep those arms firearms and firearms accoutrements without warrant or with faulty warrants on the grounds of "res adjudicata" although the United States and the District Court later admitted that these searches and seizures were, in parts, unlawful and made in violation of the Fourth Amendment of the Constitution of the United States?

III

May the United States, the United States District Court and the United States Court of Appeals for the Seventh Circuit deprive Richard A. Lauchli, Jr., of his property and liberty without compensation and without the due process of law guaranteed by the Fifth Amendment of the Constitution of the United States, while denying to Lauchli that right to avoid self-incrimination?

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[1] Since repealed

[2] Since repealed for Constitutional infirmities and reinstituted in a revised form.

[3] Lauchli was a "militiaman" in the terms of 10 U.S.C. Section 311 and was active in militia type organizations at the time.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 10, UNITED STATES CODE SECTION 311:

(a) The militia of the United States consists of all able bodied males at least 17 years of age and except as provided in ss 313 of Title 32, under 45 years of age who are or who have made a declaration of intention to become citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.

(b) The classes of the militia are:

(1) The organized militia, which consists of the National Guard and the Naval Militia;

(2) The unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

TITLE 28, UNITED STATES CODE, Section 1331:
Federal question; amount in controversy; costs
(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.
(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000 computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended July 25, 1958, Pub. L 85-554, § 1, 72 Stat. 415.

TITLE 28 UNITED STATES CODE, Section 1345:
United States as plaintiff
Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

TITLE 28 UNITED STATES CODE, Section 1346:
(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of United States against any plaintiff commencing an action under this section.

TITLE 28, UNITED STATES CODE, SECTION 1356
Seizures not within admiralty and maritime jurisdiction
The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction.

STATEMENT OF THE CASE

Richard A. Lauchli, Jr. lives at his home in Collinsville, Illinois with his wife and daughter. He was educated in the public school systems of St. Louis, Missouri and Collinsville, Illinois through the twelfth grade. He spent 18 months in the United States Army in 1945 and 1946, separating with an honorable discharge and the rank of Sergeant. He then spent three years voluntarily in the reserves. Since that time he has been active in "militia" type groups (see: The Minutemen, Harry Jones, Doubleday & Company, Esquire Magazine, July 1967, page 47). Lauchli now works as a machinist in Alton, Illinois.

In 1964 Lauchli was arrested for violations of the National Firearms Act 26 U.S.C. ss 5801-5861 and the Federal Firearms Act, 15 U.S.C. ss 901-909. Subsequently convicted, his appeal was denied (371 F.2d 303) and he was denied the right to proceed to the Supreme Court by his attorney (now Court of Appeal Judge) Robert Sprecher. The confiscated material of this arrest and conviction is before this Court as USCA No. 72-1433. While serving the sentence, Lauchli filed a U.S.C. 28, Section 2255 motion on January 8, 1968. This is now before this Court as U.S.C.A. No. 72-1247. This case was further fragmented by Order of the District Court and the second part of it is before this Court as U.S.C.A. No. 72-1401. What is now USCA No. 72-1433 was ordered reversed and remanded by this Court as No. 5016 O.T. 1970. When the Supreme Court so acted, the Court of Appeals then shelved what is now USCA No. 72-72-1433 and remanded USCA Nos. 72-1247 and 72-1401 back to the District Court for further determination. The District Court continued to rule against Lauchli and the Court of Appeals then held that No. 72-1433 was also to be held against Lauchli. In effect, both Courts have held that this Supreme Court's decisions in HAYNES V. UNITED STATES, 390 U.S. 39 (1968) and UNITED STATES V. U.S. COIN & CURRENCY, 401 U.S. 715 (1971) had no effect on Lauchli's cases. This afforded more particularity in the body of this Petition.

In 1965 Lauchli was again arrested for violations of the National Firearms Act (pre HAYNES version) 26 U.S.C. 5801-5861. Two machine guns, a rifle and a machine gun barrel were confiscated at the time of the arrest but without warrant and not at the place of arrest. The arrest was subsequently ordered dismissed (402 F. 2d 455 (1968)) but the items taken were never returned. Eventually, Lauchli saw them in the evidence room at Springfield, Illinois and filed claim for them. This claim was dismissed in the District Court without reason and that Court was upheld by the Court of Appeals on the grounds that Lauchli was out of time in his claim. This case is now before this Court as USCA No. 72-1355.

Lauchli started serving time in March 1967 at Terre Haute, Indiana on the 1964 case. He was released on a Mandatory Release in February 1969. He was in the penitentiary during the entire "amnesty period" declared by Congress upon the repeal of the pre-HAYNES National Firearms Act and the enforcement of the National Firearms Act of 1968. In April 1969 he was arrested and charged with violation of the National Firearms Act and the National Gun Control Act of 1968. Subsequently convicted, he appealed but was denied (444 F.2d 1037 (1971)) and Certiorari was denied, 404 U.S. 868. His attempts to file collateral attacks and for habeas corpus relief have been refused by the District Courts. An appeal from the habeas corpus rejection is now pending in the Court of Appeals as No. 73-1147 with the last filing having been completed in May 1973.

At the time of the arrest in 1969, the agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department took huge quantities of firearms and firearms accouterments from Lauchli's home and shop and his wife's farm. No warrant was had for the farm which is about two miles from Lauchli's home and shop. Some items taken from the home and shop were on warrants but some were not. Subsequently in a Rule 41 (e) hearing on July 23 and 26, 1969 the District Court held that there was probable cause for the warrants. However, at that time and later, the United States gave back

some of the items taken and District Court ordered the return of many more items that had been taken. Included among the returned items were a pickup truck, typewriters, 41 rifles, revolvers and shotguns. Also ordered returned by the District Court were 60 cases of ammunition. As of August 12, 1973, these have not been returned. Also ordered returned by the Court of Appeals was a small quantity of machine gun parts and records, maps and letters. The machine gun parts have been returned but the records, maps and letters have apparently been destroyed by agents of the Alcohol, Tobacco and Firearms Division. Lauchli has asked that the United States be held in contempt of the United States Court of Appeals. This matter is pending as of August 12, 1973. The confiscation of this material is before this Court as USCA No. 72-1251.

Since these five cases involve a time spread of some nine years, with litigation proceeding on most of them during that entire time; with the numerous pleadings, counter-pleadings, and Orders in these cases making a file of such magnitude, this petitioner is at a loss as to how to make a "concise" statement of the case and yet contain therein those facts material to the questions presented. For that reason, this Court is respectfully directed toward the records which should be in its possession. It is only fair to note, however, that while Lauchli has respectfully requested both the Clerks of the Court of Appeals and that of the District Court to forward these records to this Court, there is no indication that such has been complied with. Past experience shows that it will be impossible to have the entire records available to this Court as for some reason unknown to Lauchli, there is a reluctance on the part of the Clerks to forward the entire record.

The jurisdiction of the Court of first instance is based upon alleged violations of Federal law within the judicial district of the instant court. Neither side has objected to that jurisdiction at any time. Statutory jurisdiction is placed by 28 United States Code Sections 1331, 1345, 1346, and 1356.

REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT

The primary reason that this Court should grant certiorari to this case (actually five cases brought into one) is that they have been under litigation for over nine years. Every known avenue of relief has been explored. A very grave injustice has been perpetrated and unless this Court of last resort acts, that injustice will survive. As President Nixon has said: "If we cannot settle our differences in the Courts, they will be settled in the streets". Or as Mr. Chief Justice Warren E. Burger stated before the American Bar Association in St. Louis on August 10, 1970: "Few things rankle in the human breast like a sense of injustice." In this action brought before this Court lies the last chance for Lauchli -- possibly for other people too.

The Court of Appeals for the Seventh Circuit has rendered a decision in this case (USCA #72-1247) which is in conflict with the United States Court of Appeals for the Eighth Circuit on an identical issue. See footnote 8 on page 8 of the Order issued on July 6, 1973 by the Seventh Circuit. This matter touches not only 72-1247 but also 72-1433 which is the confiscation under the same arrest and which all parties agree stands or falls on the questions presented in 72-1247. 72-1251 was based on post HAYNES v. UNITED STATES, 390 U.S. 39 (1968) law but is is submitted that pre-HAYNES conditions existed for the reason that Lauchli was prevented from registering his material during the amnesty period.

Further, not only is the Seventh Circuit in conflict with the Eighth Circuit but also in conflict with its own decisions such as UNITED STATES v. MICHAEL, No. 17352 (April 3, 1970).

The United States also believes that HAYNES is controlling in these cases. See attached letter of Calvin K. Hamilton to Clerk of Eighth Circuit.

The Court of Appeals for the Seventh Circuit has decided a Federal question in such a manner as to conflict with applicable decisions of this Court. What is now USCA #72-1433 had previously been brought before this Court as No. 5016 October Term, 1970. This Court granted certiorari, vacated the judgement and remanded the case to the Court of Appeals for the Seventh Circuit for reconsideration in light of HAYNES v. UNITED STATES and UNITED STATES v. U. S. COIN AND CURRENCY (supra). The HAYNES decision is here applicable to all of the five cases except 72-1355. The UNITED STATES v. U. S. COIN AND CURRENCY decision is applicable to 72-1355, 72-1433, and 72-1251. While a hearing was held in the District Court on the applicability of HAYNES to 72-1247 the United States offered evidence that there were some legal transaction under the law. However, this is a foregone conclusion and is admitted. Lauchli offered evidence that although legal transactions did exist, the vast majority of both legal and other transactions were criminally suspect. The District Court refused to allow Lauchli's witnesses on the stand and chose to ignore Lauchli's testimony. A great number of other decisions of this Court have been ignored or refuted by the District Court and the Court of Appeals. These will be dealt with more particularly in the body of this document.

The United States District Court for the Southern District of Illinois has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Such departure has been sanctioned by the United States Court of Appeals for the Seventh Circuit in the Orders contested herein.

It must be pointed out that the errors in both courts were not unintentional nor harmless but were deliberate and determined to prejudice Lauchli. District Judge Omer Poos has admitted prejudice against Lauchli as early as June 24, 1968. It is well established that such prejudice still exists. Nor is it confined to the District Court. Robert Sprecher was formerly Lauchli's attorney and prevented Lauchli from proceeding to this Court in 1966.

Now he is a Judge on the Court of Appeals. Otto Kerner personally ordered an investigation of Lauchli in 1961 while Governor of the State of Illinois (an investigation which showed Lauchli innocent of wrongdoing). Kerner was a judge on the Seventh Circuit while these proceedings were before it. The Seventh Circuit refused to allow Lauchli transcripts for the preparation of his appeal after those transcripts had been ordered supplied by the District Court. Further, the Seventh Circuit made available other transcript under such condition that Lauchli could not use them, even though Lauchli had offered to have the transcripts copied and paid for. There has been falsification of evidence such as adding explosives to signaling devices to influence the jury, parading of Lauchli in handcuffs before the jury, and the designation as a "firearm" a piece of a part of a firearm which had been torch cut into scrap before sale by the Navy. There are actually hundreds of "errors" of a prejudicial nature as well as delays carefully calculated to cause prejudice. For instance: No. 72-1401 was submitted to the District Court on January 8, 1968. It laid there for two hundred and eighty nine days. Then it was delayed twenty three months in the Court of Appeals. Then it went twenty more months on remand to the District Court.

These actions are not without explanation. While Lauchli was in the penitentiary at Terre Haute, Indiana, a report was prepared for the Classification and Parole Department on June 13, 1967 which described Lauchli as a "political prisoner". Lauchli has been persecuted and prosecuted as a political prisoner and not for any lawbreaking. This Court must use its supervisory powers to correct such use of judicial power to curtail political activity.

ARGUMENT

Initially, it must be pointed out that Lauchli made request of the Clerks of Court of the Seventh Circuit and the District Court below under Rule 21.1 of this Court to have the records in this case (s) forwarded to this Court. This was done in a letter to each Clerk on July 12, 1973. It appears that such has not been done and hence Lauchli is prevented from refering to any specific document within the record by the lack of compliance by those Clerks with Rule 21.2 of this Court. Lauchli applied to the Clerk of this Court on July 26, 1973 for the "numbered list of the documents, identifying each with reasonable definiteness" in order to refer to them herein but no answer has been received by Lauchli. Such failure to comply with the Rules of this Court deny Lauchli due process of law and prejudice this action.

FIRST ARGUMENT

In each and every one of the five cases consolidated herein, Lauchli has brought to the attention of the Court of Appeals that the material involved was and is of a military nature, intended for militia purposes and retained by Lauchli who, at the time of origination of these cases, was a member of the militia quasi-organized and disciplined.

In each and every one of the five cases and by the District Court and the Court of Appeals, this issue has been carefully avoided. Those courts below have made no ruling, they have simply ignored the issue. There is no lack of Supreme Court dictum on this issue although it appears that this Court, too, has been reluctant to reaffirm the issue in recent years.

"Lauchli qualified as a member of the militia of the United States under 10 U.S.C. 311 not only because of his having met the statutory requirements but (probably more important) also the conduct requirements and mental requirements of the Constitution. He was active with paramilitary groups such as the Minutemen and

Counter-Insurgency Council. The Illinois State Constitution in effect at the time in question (1964) also claimed Lauchli to be Militia (of the State of Illinois).

Under the Second Amendment of the Constitution, 'the right of the people to keep and bear arms shall not be infringed' and this was preceded with the explanation that 'a well regulated militia, being necessary to the security of a free state.' Every single decision of the Supreme Court has upheld the view that "the (second) Amendment declares that it (the right to bear arms) shall not be infringed; but this means no more than it shall not be infringed by Congress. This is one of the Amendments that has no other effect than to restrict the powers of the National Government" UNITED STATES V. CRUIKSHANK, 92 U.S. 553 (1875). State regulations are not at bar here. The Supreme Court has consistently held that this prohibition applies only to the kind and type of arms involved in Nos. 6426 and 6427 (the same kind and type of arms involved in each of these cases.) There is no right to arms for purposes of hunting or even self-protection or, even for that matter, 'lawful purposes'". See: MILLER V. TEXAS, 153 U.S. 538 (1894); PRESSER V. ILLINOIS, 116 U.S. 265 (1886); UNITED STATES V. MILLER, 307 U.S. 174 (1939); UNITED STATES COURT MARTIAL REPORTS, Vol. 14, 1953/1954, page 40.

Assuming arguendo, it is noted that a "militia" of full military training, discipline and conformity was not a "militia" in the American understanding of the term. See: April 29, 1821 correspondence of John C. Calhoun reported in the ANNUAL REPORT American History Association, 1899 (Washington 1900) II at page 185. The application of the National Firearms Act to the acts of Lauchli and that same application to the Federal Firearms Act was violative of the Second Amendment rights of Lauchli and the Judgement and Sentence growing therefrom are null and void." CF Original Motion for Relief under 28 U.S.C. 2255 or in the Alternative, for a Writ of Habeas Corpus in Civil No. 4784 (U.S.C.A.-7 No. 72-1401).

This Court is respectfully referred to the record and specifically to Lauchli's BRIEF OF APPELLANT in No. 72-1251 pages 29, 30, and 31, where this issue is again presented to the Court below. It is respectfully submitted that the records in these cases fully disclose the content of this argument and to repeat them at this point would be superfluous. Should this Court desire additional argument, Lauchli would be delighted to comply.

SECOND ARGUMENT

The seizures of property contested herein (USCA-? Nos. 72-1251, 72-1355, 72-1433) are in violation of the Fourth Amendment and the dictum of this Supreme Court.

No. 72-1433 had previously been before this Supreme Court as No. 5016, October Term, 1970, was granted certiorari and Ordered remanded to the Court of Appeals. That Court has taken it on itself to defeat this Court's direction and has chosen to retain its former position. The Court of Appeals decision in No. 72-1433 is more complicated than it appears on the surface. It is respectfully submitted that the Court of Appeals is in error on the Fifth Amendment applicability of HAYNES V. UNITED STATES, 390 U.S. 85 (1968) but this argument is carried more fully in a later ARGUMENT here. For the moment it is sufficient to say that the Court of Appeals takes the view that this property is per-se contraband while at the same time taking the view that the possession of such items does not violate HAYNES (supra) and the Fifth Amendment because a possessor is not criminally suspect. The Court of Appeals takes the peculiar view that Lauchli has not been denied his Constitutional Rights for the reason that he was not convicted of "possession" but that he must give up his claim to this material for the reason that it is illegal to possess the property, all the while saying that Lauchli is not in that class of persons "inherently suspect of crime." This is inconsistent at the least.

This Court is mandated by the Constitution to consider facts as well as law. The facts of these cases are that nowhere has the government shown this property to be intended for illegal purposes. As a matter of fact, this property was in a large measure, left over from a previous business and the balance is and was Lauchli's for personal and private use. The Pontiac automobile belonged to an innocent party (Lauchli's wife) and the siesure of such is clearly prohibited by UNITED STATES V. U.S. COIN AND CURRENCY, 401 U.S. 715. Money such as the $17,000 involved here was Ordered returned in the same case. The items listed on page 2 of the Findings of Fact, Conclusions of Law and Decree of Forfeiture issued by the District Court in (now) No. 72-1433 were never offered for sale or trade. Likewise those items on pages 3 and 4; as a

singular example: The Remington Model 17 20 gauge shotgun (last item on page 4) was taken from Lauchli's clothes closet and was there for the purpose of home defense. It is completely legal and had been inspected and approved by the Alcohol and Tobacco Tax Unit some years previous to the seizure.

These searches and seizures were not made in compliance with the Constitution of the United States but were search and destroy mission in the Vietnamese sense of the term.

The Court of Appeals reliance upon the Federal Firearms Act conviction is misplaced. That conviction was based on a conviction of Lauchli made in the same District Court in 1957. However, the District Court while admitting that the 1957 conviction was made in violation of Lauchli's constitutional rights but has denied Lauchli access to court in further violation of the Constitution. See: Order of Judge Robert D. Morgan entered June 6, 1972. Consider in light of UNITED STATES V. MICHAEL, 426 F. 2d 1067 and HAINES V. KERNER, 92 S. Ct. 594 (1972).

In No. 72-1251 the rationale of the Court of Appeals and of the District Court amply refutes the affirmance by the Court of Appeals Order of the District Court in No. 72-1251 but also in No. 72-1433. The District Court in its Opinion of November 16, 1971 amply made the measure of conduct when it said: "The fact remains that none of the items in question were sold to Mr. Ennis. If any one of the items *** were sold to Mr. Ennis there would be no doubt to this Court that Mr. Lauchli had possession of these items." (page 8). None of the items sought to be recovered in No. 72-1251 had been sold to Mr. Ennis or anyone else. The United States did not appeal that decision of the District Court.

The Court of Appeals reliance on the "res adjudicata" principle is in error in this case. In both cases, the criminal conviction stands only because of a prohibition (albeit unconstitutional) against allowing Lauchli into Court to prove his contentions that the cases were illegally and unconstitutionally consumated. Those criminal convictions are partly under

consideration by this Court in this case as No. 72-1247 and 72-1401 and because of a denial of access to Court, as a habeas corpus appeal in U.S.C.A. -7 No. 73-1147 now before the Court of Appeals.

Other important and compelling reasons for reversing the Court of Appeals are found in the Briefs of Appellant filed under the respective single cases and which are incorporated herein by reference.

Seizures made without warrant, more than two miles from the scene of arrest and admitted by the United States to be illegal can hardly be sustained by "res adjudicata". Indeed, the conviction was obtained by introducing such "evidence" before the jury and some of this "evidence" was then Ordered returned by the District Court after the trial and after such presentation to the jury. It is respectfully submitted that this Court's earlier granting of certiorari and subsequent Order of remand amply refutes any reliance of res adjudicata in these cases. Other important and compelling reasons are carried more fully in the following Third Argument.

THIRD ARGUMENT

1. Self-incrimination.

During the entire period granted by Congress as an amnesty period between the enforcement dates of the pre-HAYNES (supra) National Firearms Act and the National Firearms Act of 1968, Lauchli was held in the penitentiary at Terre Haute, Indiana. He was, then, effectively blocked from registering any of his material without prosecution. After his release from prison, this was affirmed by conversations with the Alcohol, Tobacco and Firearms Division agent in Springfield, Illinois, Mr. Patrick Huffman. Thus any application of the National Firearms Act of 1968 to Lauchli was ex post facto law in violation of the Constitution. This issue has been raised by Lauchli throughout the proceedings but has not been answered except by a statement made in open District Court by the United States Attorney that the above was true. Neither Court took notice of it. Certainly all of the material contested in No. 72-1251 was obtained and held by Lauchli prior to the enactment of the NFA/68. Testimony was given and accepted on that fact. This of course, was exactly why Congress granted the amnesty--to prevent ex post facto law from being brought to bear on those persons possessing such material at the time of enactment. Because of the circumstances in which Lauchli found himself, he was not able to take advantage of the amnesty period, and thus would have been forced to incriminate himself if he had tried to register his material.

While the above adequately disposes of No. 72-1251, it is notable that No. 72-1433 was propositioned on Pre-HAYNES law. This Court granted certiorari and remanded back for reconsideration in the light of HAYNES and UNITED V. U. S. COIN AND CURRENCY (supra). The Court of Appeals did nothing but pigeon hole the mandate from April 1971 until July 1973. However, the Court of Appeals did have under consideration No. 72-1247 to the District Court with orders to hold hearings on the applicability of HAYNES and MINOR V. UNITED STATES, 396 U.S. 87 (1969) and "any other questions necessary for a final decision."

The District Court did conduct hearings under certain restrictive conditions which included NOT considering the "any other (questions) necessary for a final decision." The District Court instructed Lauchli to file a new 2255 motion on these which he subsequently did by hand written motion (he was held in county prison at the time). This new Motion is now before this Court as No. 72-1401. The government offered one witness, a Mr. Wolfe who testified that there are legal sales made. Lauchli was denied all of his witnesses except a Mr. Scherer who testified that persons involved with firearms are inherently criminally suspect. Lauchli took the stand and testified that even those persons and firms who engage in legal sales are nevertheless criminally suspect. While certainly one convicted of crime can expect a lower rate of credibility attached to his testimony, it is notable that the United States Attorney told the Court of Appeals at the time of oral argument in these matters that "Lauchli has never told us wrong in these matters, all that we have been able to check out has been true." Judge Omar Poos told Lauchli's attorney in the Courtroom: "your client is a very truthful person". At any rate, Lauchli's statements on the stand were accepted and no attempt was made to impeach them.

Also evidence was shown that the forms to transfer firearms are readily available to anyone as opposed to the restricted availability of the narcotics forms in MINOR.

It is respectfully submitted to this Court that the evidence DID show that any person connected with firearms in any manner whatsoever, IS inherently suspect of criminal conduct. We further submit that common sense will show that if any Justice on this Court saw a man come out of a store, walk down a street, get into or out of a car or perform any other everyday task or activity while in possession of any of the guns controlled by the National Firearms Act, he would be criminally suspect immediately and if a police officer was present would be taken down for questioning.

It is notable that in this Circuit, the Court of Appeals has gone beyond the Supreme Court decision in HAYNES with the case of UNITED STATES V. MICHAELS, No. 17352 (April 3, 1970) Court of Appeals for the Seventh Circuit, which makes the defense of self-incrimination, retroactive. These cases also guarantee the right to impose the self-incrimination defense at the time of trial. Lauchli has never enjoyed that right.

2. Due Process of Law

There have been literally hundreds of denials of due process, all of a serious prejudicial nature. Naturally they cannot all be brought out here. Some have been covered in the briefs filed in the Court of Aopeals in these cases and this Court is respectfully directed to those Briefs of Appellant.

In No. 72-1355 the District Court denied Lauchli's Motion for Return of Property on the grounds that it was not with merit. However, the Court of Appeals in affirmance based its decision on the fact that Lauchli's Motion had been filed some six weeks later than was statutorily permitted. No hearing was had in the District Court where Lauchli was prepared to show that his Motion was entitled to a legal disability for the reason that the material in question had been spirited away by government agents and he had no knowledge of where it was located (within or without the judicial district) and as subsequent events did show, neither did the United States. Further, Lauchli was imprisoned during this time with very little legal facilities available to him and no legal assistance. Lauchli had contacted the legal departments of Washington University, Southern Illinois University, St. Louis University, Illinois University, Legal Aid Offices in Southern Illinois and various private attorneys seeking help but without success. None of those people want to get involved with guns and especially with machine guns. Lauchli had tried to file court actions to get the necessary legal books in the penitentiary library but these suits were dismissed by the District Court on the grounds that they didn's have authority to interfere with prison officials. The Court of Appeals for the Seventh Ciruit affirmed the

lower courts. Example: U.S.C.A.-7 No. 661 Motion for Extraordinary Writ. This Court refused to grant certiorari for reasons unknown. Advise from other inmates was that Lauchli had until six months after he was released from prison in which to file. This Court has held that the law may be stretched in order to prevent injustices. JEANETTE E. GONDECK V. PAN AMERICAN WORLD AIRWAYS, 382 U.S. 25, 86 S. Ct. 153. Certainly where the government has violated every law in the book to take this material, a six weeks delay without a protest of prejudice from the United States should not be fatal to it. As will be shown in a later paragraph, the Courts took years to consider cases which should have been decided in days. Can the United States have its cake and eat it too by crying about six weeks while taking years in deliberate delay?

The question of prejudice of the District Court Judge has arisen in each of these cases. In No. 72-1355 the Court of Appeals states that the Affidavit of Prejudice required by 28 U.S.C. 144 was not filed until September 20, 1971. But this Court overlooks the fact that the District Court, prodded by Lauchli's Motions in the Court of Appeals did not accept the case until April 11, 1972 (almost seven months later.)

In No. 72-1433 Judge Poos admitted prejudice and was replaced by Judge Robert D. Morgan. By law, Lauchli was prevented from seeking further relief from a prejudiced Judge but this doesn't mean that Judge Morgan is not prejudiced. Nor can it be said that Judges on the Court of Appeals are not prejudiced. As a matter of fact, a number of these Judges are so "enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit. Trial before an unbiased judge is essential to due process." CF BLOOM V. ILLINOIS, 391 U.S. 194, 205; MAYBERRY V. PENNSYLVANIA, 400 U.S. 455, 465.

The most astounding evidence to prove this prejudice is the statement of Erwin W. Stone repeating conversation between Judge Poos and Deputy Marshal Marshall. The Court of Appeals tries to belittle this

statement but it must be remembered that Lauchli was not present with Stone the entire time between when the statement was first heard and related to Lauchli and the time the statement was taken from Stone. Lauchli had been returned to the penitentiary and then back to the County Jail at Springfield, Illinois. Discreet questioning of the marshals effecting the transfers plus Stone's recitation of the facts lead Lauchli to believe in the bona-fides of the statement. It must be remembered that Judge Poos nor Marshal Marshall have ever denied the statement.

These arguments on prejudice are well carried out in the Briefs of Appellant contained in the record of each case and limitations of space here make it mandatory that this Court be respectfully directed to that source of information which is incorporated herein by reference.

Delay in proceedings.

Lauchli entered prison on March 13, 1967. After studying in the prison legal library until January 8, 1968 he submitted his Motion under 28 U.S.C. 2255 for relief from his conviction (now before this Court as No. 72-1247). On October 22, 1968, some 289 days later, the District Court without hearing, issued its final Order denying relief. Immediately a Notice of Appeal was submitted and on December 26, 1968 the Court of Appeals issued a show cause Order. It was not until September 16, 1970 that the Court of Appeals issued an Order remanding the case to the District Court. No reason has ever been given for the twenty three month delay (nine months from oral argument). The District Court then delayed until March of 1971 to hold hearings on this matter. A decision was not had from the District Court until January 24, 1972 when it denied Lauchli relief, again. Again an Appeal was effected to the Seventh Circuit which was delayed until July 6, 1973. Five years of delay in this matter are intolerable and denies due process to Lauchli.

No. 72-1433 is little better off but it did take the extra step of going to the Supreme Court where it laid in limbo for 28 months. It has been litigated since November 1964. Such delays as these are recognized as due process deprivations in DICKEY V. FLORIDA, No. 728 O.T. 1969, fn: p. 5.

A further denial of Due Process is evident in Nos. 72-1247, 72-1401, and 72-1433 when the Court of Appeals denied transcripts of the District Court proceedings to Lauchli but instead made them available to Lauchli at the Clerk of the District Court's office, knowing that such made the transcripts virtually unuseable by Lauchli for the reason that he had to work during the hours the Clerk's office was open. The District Court had ordered on February 18, 1972 that Lauchli should be furnished a set of the transcripts in No. 4202 (USCA-7 No. 72-1247). When Lauchli took a day off from work in which to study and make notes from the transcripts, he was given space among various persons with typewriters who created such a din as to prevent any study and to preclude any possibility of reducing to tapes any of the transcripts. This appears to have been deliberately done. This Court certainly didn't foresee such actions when it decided GARDNER V. CALIFORNIA, No. 73, O.T. 1968 (January 20, 1969). Lauchli, who was just out of prison, still on parole, and ridden with debt, nevertheless, offered to have the transcripts copied and to pay for the work, was refused this reasonable request. This was brought to the attention of the Court of Appeals in a Motion submitted on July 9, 1972. The Court of Appeals ignored that Motion.

No less a deprivation of Due Process rights exist when hearings were denied in No. 72-1401 as well as No. 72-1355. This Court spelled out what was needed in HAINES V. KERNER, 92 S. Ct. 594. It is obvious that Lauchli lacked the legal skill in which to prepare his legal writings and certainly he was entitled to give oral support of those writings in court. The government had no trouble in obtaining hearings on anything which they wished to put in the record and Lauchli was discriminated against by not being allowed the same.

There have been so many Due Process violations that space will not permit them all to be recognized here. This Court is respectfully directed to the several Briefs of Appellant filed in the various cases herein and they are hereby made a part of this pleading by reference.

3. Private Property for Public Use.

When the government confiscates private property, it does not simply destroy it. First it waits until such time as it believes litigation is ending. At least this happens in most cases. Then the government lists this material and makes it available to governmental agencies for their use. Then it makes it available to public museums and other groups. It is respectfully submitted that such use of private property for public use violates the Fifth Amendment. Such use makes fatal any claim the government may have on the property in the first place. In the instant cases, it is known that the government has already removed some of this material for the use of the Alcohol and Tobacco Division in its Washington, D. C. museum. This is material that is supposed to be in the District Court's custody. Since the final Order was received in No. 72-1251 it has become of knowledge that certain papers, records, letters, and maps which had been ordered returned to Lauchli have "disappeared". This material had been taken-not as evidence as the government would have us believe--but to aid the government in the investigation of many other persons than Lauchli. This is public use. Lauchli has tried to file suit on this material but has been turned down by all District Courts in the area and by the Court of Appeals. This Court had the case before it as No. 71-5686 but certiorari was denied with Mr. Justice Douglas voting to grant certiorari. It is notable that a Federal Grand Jury has recently indicted 12 government agents for similar conduct as Lauchli claimed in No. 71-5686. Apparently under existing law, you can obtain relief from illegal acts of government if you are accused of violating narcotics law but not if you are accused of violating firearms laws. Such discrimination cannot be left standing. It is notable that CIO-AFL

President George Meany recently stated that "if the government can break the law, that is the end of democracy in the United States". This must not be allowed.

CONCLUSION

The importance of granting certiorari in this case cannot be over-emphasized. The effects that these violations of Constitutional guarantees are not only important to Lauchli but to all of the citizens of the United States. It is a fair statement to make that if the government had been stopped from its illegal activities in the earlier attempts by Lauchli to receive court relief, there would not have been cases like the Frank Bellew case of Maryland where a man was turned into a vegetable by the shots of irresponsible Alcohol, Tobacco and Firearms Division Agents; the multi cases in and around Collinsville, Illinois where narcotics agents terrorized citizens; and the many cases around the country which have recently been disclosed, Watergate not excepted. Such occurrences are expected in Nazi Germany or Stalinist Russia but not in the United States. If they are permitted to continue, the people can only be expected to seek a new form of government. The problem is not that the Constitution is outmoded nor impotent but that is is not upheld. The Constitution is only what the Supreme Court makes of it.

RELIEF SOUGHT

For the reasons of the unreasonable delays encountered in the lower courts and the prejudice which Lauchli has encountered there, justice would not be served by a remand to those courts. However, it must be admitted that Lauchli can find no case where this Court has taken a final Order upon itself. Whether this is an indication of reluctance on the part of this Court or a mark of the inadequate research Lauchli is capable of is not known. It is known that

unless this Court gives explicit directions to the Courts below and sets a time limit in which they must act, this pleading will have been in vain for those Courts have steadfastly indicated that they will not enter any Order in Lauchli's favor. Justice can only be served by this Court giving an Order totally in Lauchli's favor.

Respectfully submitted this August 30, 1973.

Pro-se:

Richard A. Lauchli, Jr.
2012 North Keebler Street
Collinsville, Illinois 62234
Phone (618)344-9402

May 11, 1971

On the evening of April 17, 1971, while sitting in the cage of the Marshal's office in Springfield, Ill. awaiting the deliberation of the Jury in my trial, I overheard a conversation between Judge Poos and Marshal Sheet. What caught my attention to the conversation was the mention of a man's name I am familiar with through time spent in the city prison. That name was Lucchi. The main part of the Conversation in which I heard was about his machine guns and his efforts to get them back. Sheet said "He's sure trying to get those guns back ain't he Judge". Judge Poos said, "He'll never get them back through this court." Sheet said, "you know anybody whose got that many machine guns stashed wouldn't have any legal intensions, I mean, with 200 of them, there wouldn't be any other reason." Judge Poos said, "He's trying to make me believe his story, if he had 5 or 10 maybe, but 200, no I can't go along with him on that." They all laughed and then they started talking about shooting a machine gun. In general how many rounds one could fire and as a whole how many they all could fire etc. The subject of "minute men" was brought up by Sheet but I couldn't say as to the conversation because of the commotion of laughter and talk. I know Sheet said something about not giving them back to him no matter what and the Judge said something about it not being safe to do so. Sheet also said something about Jailhouse lawyers think they can get out of anything and the Judge did say he had a few good points but couldn't go along with them. The Judge also said they couldn't let those guns out in society because it would be to much of a chance to take even if he had good intentions, which is doubtful, nobody needs those guns.

Erwin W. Stone

SIGNATURE WITNESSED BY
Richard A. Lambridge Jr.
AT CITY JAIL, FEDERAL SECTION
SPRINGFIELD, ILLINOIS

United States Department of Justice

UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI
549 UNITED STATES COURT HOUSE
KANSAS CITY, MO. 64106

October 9, 1968

Hon. Robert C. Tucker, Clerk
United States Court of Appeals
Eighth Circuit
Room 530, U. S. Court House
St. Louis, Missouri 63101

Re: Richard A. Lauchli v. United States
C.A. 8, No. 19138

Dear Mr. Tucker:

In view of the decision of the Eighth Circuit Court of Appeals in DePugh, et al., v. United States, Nos. 18,732, 18733 and 18,772, on September 30, 1968, the Department of Justice, believing this case to be controlled by the DePugh decision, announces that it will forgo argument on October 15, 1968, and submit the matter on its brief heretofore filed.

Very truly yours,

CALVIN K. HAMILTON
United States Attorney

By

ANTHONY P. NUGENT, JR.
Assistant U. S. Attorney

APN:ed
cc - Lewis E. Pierce, Esq.
Richard A. Lauchli

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1972 April Session, 1973

No. 72-1247	)	Appeal from the
Richard A. Lauchli, Jr.	)	United States Dis-
Petitioner-Appellant,	)	trict Court for
v.	)	the Southern Dis-
United States of America,	)	trict of Illinois
Respondent-Appellee	)	Civil 4202
		Omer Poos, Judge

Heard April 9, 1973 - Decided July 6, 1973

Before Swygert, Chief Judge, Kiley and Cummings, Circuit Judges.

PER CURIAM. This appeal stems from our prior opinion in Lauchli v. United States, 432 F.2d 1207 (7th Cir. 1970). There we remanded the cause so that the trial court could resolve certain questions arising from petitioner's conviction for violation of five Sections of

the National Firearms Act of 1934[1]. The district court was required to determine the following three questions:

1. Whether importers, manufacturers and dealers in firearms are, as a class, almost exclusively individuals inherently suspect of criminal activities, so that Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62, and Haynes v. United States, 390 U.S. 85, would require setting aside petitioner's convictions under 26 U.S. C. §§ 5801 and 5802.

2. Whether transferors of firearms are such a suspect class, thus similarly invalidating petitioner's convictions under 26 U.S.C. §§ 5811, 5813 and 5814.

3. Whether the principle of Minor v. United States, 396 U.S. 87, where the Supreme Court decided that the Fifth Amendment is not available as a defense to a charge of selling narcotic drugs and marijuana without the written order forms required by law, saves petitioner's conviction under 26 U.S.C. § 5814.

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[1] 26 U.S.C. §5801, which imposed a special tax on importers, manufacturers and dealers in firearms; 26 U.S.C. § 5802 which required such persons to register with the Treasury; 26 U.S.C. § 5811, which imposed a tax on each firearm transferred, which the transferor must pay by purchasing a stamp; 26 U.S.C. § 5813, which required the stamp be affixed to the requisite order form; and 26 U.S.C. § 5814, which made it unlawful to transfer a firearm except in pursuance of a written order from the transferee on a blank issued by the Treasury on application of the transferee.

Determination of the first two questions was to be made "as a matter of fact," 432 F. 2d at 1210.

Upon remand, the district court conducted evidentiary hearings on March 18 and 25, 1971. Petitioner was represented by appointed counsel. The district court confined evidence at the hearing to the three questions specifically referred, and in view of the evidence presented on these questions and their resolution, there was no occasion under our mandate to consider anything further.

At the hearing, Cecil Wolfe, an official of the Treasury Department, testified for the Government that there were licensed importers, manufacturers and dealers in firearms subject to the registration and occupational tax provisions of 26 U.S.C. §§ 5801 and 5802 in about 45 of the 50 states in 1964, when these offenses occurred. There were five classes of these special occupational taxpayers under the regulations promulgated under the National Firearms Act of 1934. Petitioner fell in Class I, which covered importers and manufacturers of firearms not covered by the other classes. Wolfe testified that during fiscal year 1964 there were 18 Class I manufacturers and importers registered under the Act, including a number of familiar and legitimate businesses.[2] He said that the tax and registration provisions of the Act were designed to qualify legitimate business operations. He added that the lawfulness of a Class I business was not related to the size of the operation and that a person could register and pay the special tax as a manufacturer without becoming a member of an inherently suspect class.

[2]During the same fiscal year five Class II manufacturers and importers registered, sixty Class IV dealers registered and paid special occupational taxes, and ninety-four Class V dealers registered and paid the taxes.

As to transfers of firearms, Wolfe testified that as of 1964 there were over 100,000 firearms registered under the 1934 National Firearms Act (excluding those owned by the military and the Federal Government), each of which was subject to its transfer provisions. He estimated that between 5,000 and 10,000 fircarms were actually transferred under the procedures of the Act in 1964, the pertinent year, including transfers by collectors, law enforcement agencies, individual peace officers, licensees and special occupational taxpayers and excluding transfers to the military and exports.

Wolfe stated that the form used to record a transfer of a firearm in 1964 was a Form 4. The Transferee was required to obtain the form, fill in certain information about himself and present it to the transferor in duplicate. The Transferor would then complete the form, attach and cancel a tax stamp, and forward the form to the Director, Alcohol and Tobacco Tax Division. According to Wolfe, the form would be obtained from an Internal Revenue Service or Alcohol, Tobacco Tax office, and the transfer tax stamps could be purchased by anyone from an Internal Revenue Service district director's office without giving any information.

Anthony Scherer, Jr., a former Class IV firearms dealer, was called as a witness for petitioner. In his opinion, formed partly on the basis of his own experience and partly on "stories heard from other dealers," persons engaged in the firearms business with less than $100,000 per annum volume are generally regarded as persons inherently suspect of criminal activities. Although not a manufacturer, he related hearsay information that some firearms manufacturers had been harassed by the Government. He also alleged he was personally harassed

Petitioner's request to subpoena two former police officials similarly to testify to the effect that in their opinion persons engaged in the sale of certain firearms subject to the National Firearms Act whose gross business was less than $100,000 per year would be inherently suspect of criminal activity was denied. However, the district judge allowed an offer of proof and clearly considered its purport in making his decision, saying he would "take it with the case."

Petitioner then testified in his own behalf. He stated that his experience in the firearms business convinced him that all persons and corporations engaged in that business, regardless of volume, were inherently suspect.[3] He conjectured that he might have been required to identify himself if he had purchased tax stamps in 1964. He admitted that tax stamps and the forms used under the 1934 Act could be obtained by anyone.

In its unreported opinion upholding petitioner's conviction under the 1934 Act, the district Court found that since a number of Class I legitimate manufacturers registered and paid this tax in 1964, their existence "conclusively refutes the contention that Sections 5801 and 5802 (of the National Firearms Act) were directed almost exclusively to individuals inherently suspect of criminal activities."

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[3]Petitioner asserted that, among others, the Goodyear Tire and Rubber Co., the Browning Arms Co., the Colt Co., the Olin Mathieson Co., The Mars Co., the Harrington and Richardson Co., the Cadillac Gauge Co., the International Armament Corp.--all special occupational taxpayers--were actually suspected of criminal activity.

The court also held that small manufacturers like petitioner were not inherently suspect because the legality of the manufacture of firearms covered by the Act under both federal and state law is not dependent upon size and that petitioner would not have become inherently suspect of violating Illinois law by complying with Sections 5801 and 5802 of the National Firearms Act. Therefore, the convictions under Counts I and II were sustained.

The court also upheld the convictions under Counts VI, VII, VIII, IX, X and XI involving illegal transfer offenses under Sections 5811, 5813 and 5814 because "transferors" under the same statute did not consitute a class almost exclusively of individuals inherently suspect of criminal activities. The court was influenced by Mr. Wolfe's testimony (summarized supra) that there are legitimate transfers of firearms 'inasmuch as many transfers have occurred within a legitimate and proper manner as set out by the regulations of the National Firearms Act". The court refused to credit the contrary testimony of Mr. Scherer and petitioner since "the evidence did not clearly establish the basis for these alleged suspicions" and since it was not shown that either one had become suspect by virtue of being a "transferor" under the Act.

As to 26 U.S.C. §§ 5813 and 5814 involved in Counts VII, VIII, X and XI, the Court denied petitioner's self-incrimination claim upon analysis of Minor v. United States, 396 U.S. 87, and of the possible incriminatory impact of compliane with the particular obligations contained in the above sections.

Accordingly, the district court ruled that all counts of petitioner's conviction under the National Firearms Act must stand. We affirm.

I

The evidence credited by the district judge established that manufacturers of firearms under the 1934 Act are not almost exclusively individuals inherently suspect of criminal activities. Therefore, under the interpretation of this Court in the previous appeal, the rationale of Marchetti, Grosso and Haynes, supra, is inapplicable to petitioner's failure to register as a firearms manufacturer and pay the occupational tax, as required by Sections 5801 and 5802. Since these provisions were clearly directed at law-abiding persons as well as criminally suspect persons, no automatic hazard of self-incrimination under the Fifth Amendment was presented.

The situation here under Sections 5801 and 5802 is a far cry from that in Haynes, which involved possession of an unregistered firearm under Section 5851. That Section made it an offense to possess a firearm which was acquired in violation of the making or transfer provisions or which was not registered as required by Section 5841. Section 5851 was construed to incorporate the requirements of Section 5841 so as to declare unlawful the possession of any firearm which had not been registered by its possessor in circumstances in which Section 5841 imposed an obligation to register, 390 U.S. at 94. That obligation to register was imposed on all possessors except those who acquired the firearm by transfer or importation or who made it if the National Firearms Act provisions relating to such transfer, importation or making were complied with. Thus the Supreme Court found the registration requirement to be directed principally at those persons who obtained possession without complying with the Act's other requirements. Id. at 96. Indeed almost invariably the only possessors required to

register would have been those who violated the Act's other provisions, the only cited exception being the finder of a lost or abandoned firearm. Id at 96-97 and n. 10. In contrast, the tax and registration requirements of Sections 5801 and 5802 for manufacturers, importers, and dealers do not almost invariably ensnare only those who have violated other requirements of the Act, and we see no correlation between satisfaction of these requirements and any subsequent violation of the Act which would lead us to conclude that the requirements are almost exclusively directed at an inherently suspect class. See Marchetti v. United States, 390 U.S. 39, 53-54. The number of legitimate occupational taxpayers subject to and in compliance with these requirements is persuasive evidence to the contrary.

Petitioner argues that as an Illinois manufacturer of firearms he would necessarily be inherently suspect because of an Illinois statute[4] regulating weapons and because the identity of manufacturers registered under the National Firearms Act was available to Illinois officials in 1964. However, the weapons regulated by the federal and

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[4] Ill. Rev. Stat ch 38, § 24-1 et seq.

state statutes differed.[5] Since Class I manufacturers under the former did not necessarily manufacture weapons regulated by Illinois law, the federal obligations cannot be deemed "directed almost exclusively to individuals inherently suspect of criminal activities." Leuchli v. United States, supra at 1209. Also, the Class I manufacturer was not "inherently suspect" in view of the various exemptions for certain uses provided by the Illinois statute.[6] Since a Class I manufacturer could be in compliance with Illinois law according to the type of weapon manufactured and its intended use, it cannot be said that he was confronted by a comprehensive system of federal and state prohibitions against firearms in the same way as in Marchetti, supra at 42-48. Thus whether or not petitioner was violating Illinois law, he would not be inherently suspect of such violation by complying with the National Firearms Act.

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[5] Only some weapons covered by the National Firearms Act were regulated by the Illinois statute. Compare 26 U.S.C. § 5848 (1)-(5) with Ill. Rev. Stat. Ch. 38 § 24-1 (a)(7). For example, whereas the Illinois statute applied to "any weapon from which more than 8 shots or bullets may be discharged by a single function of the firing device," the National Firearms Act covered "any weapon which shoots or is designed to shoot, automatically or semi-automatically, more than one shot by a single function of the trigger"; whereas the Illinois Act covered "any shotgun with a barrel less than 18 inches in lenght," the National Firearms Act covered in addition any "rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person."

[6] Ill. Rev. Stats. Ch 38, §24-2(c)

II

As to the transfer offenses under Sections 5811, 5813 and 5814 (see note 1 supra), the evidence credited by the district judge established that "transferors" subject to the Act[7] were not an "inherently suspect" class. Even petitioner's expert witness acknowledged the legitimate nature of many transfers. Neither he nor petitioner showed that either was criminally suspect as a "transferor."

Even if "transferors" under the 1934 Act were criminally suspect, petitioner's compliance with Sections 5811, 5813 and 5814, or at least part thereof, would not present a real and substantial hazard of incrimination as in Marchetti, Grosso and Haynes. Again the district court chose to believe Mr. Nolan's testimony that the tax stamps in payment of the $200 transfer tax were sold "like a postal stamp," with no information demanded of the buyer. As he said, "the only thing required to get one is to go down (to any district director's office) and pay the money and tell them what you want." Since no real and substantial hazard of incrimination was involved, the Fifth Amendment provides no defense to petitioner's conviction for violating Section 5811 by failing to pay the transfer tax.[8]

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[7] "Transferors" comprised a much broader class than "manufacturers" subject to the 1934 Act. See 26 U.S.C. §§ 5801 (a)(1), 5812 and 5848(10).

[8] We respectfully disagree with the contrary brief per curiam opinion of the Eighth Circuit in Lauchli v. United States, 402 F 2d 455 (1968), where the court did not explain the basis for its assertion that payment of the transfer tax under Section 5811 requires self-incriminatory conduct.

As to petitioner's failure to obtain a written order form from the transferee as required by Section 5814, the applicable Form 4[9] was issued in blank to anyone requesting it. The transferee would then complete part of the form and include his fingerprints and the certificate of a law enforcement officer that the transferee would apparently use the firearm lawfully. He was not required to furnish the identity of the transferor. The latter, in turn, could not transfer the firearm without obtaining the form from the transferee and sending it to the Director of the Alcohol and Tobacco Tax Division of the Treasury Department for prior approval.

If there was no substantial possibility that would-be transferees would present him with a Form 4 on demand, then, as in Minor v. United States Supra, and Buie v. United States, Id. petitioner simply could not sell and would be confronted only with imaginary and insubstantial hazards of incrimination rather than the real and appreciable risks that would support a Fifth Amendment defense. However, as the Government concedes and the district court found, unlike the situation in Minor and Buie, obtaining the transfer form from a prospective purchaser does seem to be a realistic possibility, because unlike the buyers under the marijuana and narcotics laws, a prospective firearms transferee could easily obtain blank forms without cost and, if his purpose were legitimate, would have no fear of completing his part of the application *** and seems to have ***no particular responsibility for determining (the seller's) legitimacy ***." Thus petitioner's self-incrimination claim is not defeated on the ground that the possibility of a buyer with transfer form in hand is purely hypothetical. Nevertheless, the claim must fail for

[9] See 26 C.F.R. §179.98 in effect in 1964.

another reason. The self-incriminatory element in 26 U.S.C. § 5814 could only exist in forwarding the order form to the Treasury Department, whereupon the seller might be admitting his violations of other sections of the National Firearms Act.[10] But even if petitioner's subsequent forwarding of the order form to the Treasury Department could be resisted on self-incrimination grounds, petitioner would have no self-incrimination basis to excuse his failure to obtain a partially completed Form 4 from a transferee before effecting the transfer, as required by § 5814 (a). See Buie v. United States, 390 U.S. at 91 n. 3.

With respect to petitioner's failure to affix the tax stamps to the order forms, as required by Section 5813, no incrimination could result in merely affixing a transfer stamp to a Form 4. This follows inevitably if the provisions requiring payment of the transfer tax by purchase of the stamps and the obtaining of an order form are valid, as we have found.

Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circu

[10] The transfer provisions would not involve Lauchli in an appreciable risk of incrimination under Illinois law because the National Firearms Act did not make transfer information available to state officials. See Haynes v. United States, supra at 99-100.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard April 9, 1973

June 7, 1973

before

Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNITED STATES OF AMERICA,	)	Appeal from the
Appellee,	)	United States Dis-
vs.	)	trict Court for
No. 72-1251	)	the Southern Dis-
One 1965 Ford Pick-up Truck, etc.	)	trict of Illinois
and RICHARD A. LAUCHLI, JR.,	)	Southern Division
Appellant,	)	Civil No. 4591
		Omer Poos, Judge.

O R D E R

In June 1970, the United States filed a suit for forfeiture of property seized at the time of the arrest of Richard A. Lauchli, Jr. on April 17, 1969, and on the following day. Lauchli had been arrested for various firearms violations and was subsequently indicted and found guilty in a jury trial. The judgment was affirmed. United States v. Lauchli, 444 F. 2d 1037 (7th Cir. 1971), certiorari denied, 404 U.S. 868. In the present forfeiture suit, after a bench trial[1] at which Lauchli appeared

[1] Lauchli waived a jury trial

pro se, the district court ordered the return of two typewriters to him. His remaining property specified in the complaint was ordered forfeited to the United States, with one exception.[2] Lauchli was granted leave to proceed on appeal in forma pauperis.

The violations leading to Lauchli's arrest and conviction are set out in United States v. Lauchli, supra at 1039, and need not be described in this order. Much of the property involved in this forfeiture action was introduced at the jury trial. On appeal, we agreed that the motion to suppress evidence on Fourth Amendment grounds had been properly denied. United States v. Lauchli, supra at 1042 n. 7.

The forfeiture complaint principally covers: (1) items seized at Lauchli's Collinsville, Illinois, house pursuant to a search warrant at the time of his April 17, 1969 arrest; (2) items seized at his adjacent Lomo Machine Shop pursuant to another search warrant on April 17 and 18; and (3) items seized at the Butkus farm north of Collinsville, Illinois, which was searched without a warrant the day of his arrest.

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[2] The exception consisted of 45 machine gun stock covers and 80 screws found in his father's pickup truck, as to which items the district court failed to rule specifically. The district court ordered the truck returned to Lauchli, Sr., an intervenor in the forfeiture proceeding. Lauchli, Jr.'s wife, Helen Lauchli, also an intervenor, was awarded a number of firearms claimed by her.

The district court refused to allow Lauchli to relitigate the legality of the April 17 and 18, 1969 searches and seizures on the ground that this issue had been resolved against Lauchli in his criminal trial. See United States v. Lauchli, supra at 1042 n. 7. Since the legality of the searches for and seizures of all the property ordered forfeited was "distinctly put in issue and directly determined" in his criminal prosecution, Lauchli was collaterally estopped from relitigating the issue. Emich Motors Corp. v. United States, 340 U.S. 558, 568-569.[3] Forty-five machine gun stock covers and 80 screws found in a paper bag in Lauchli's father's pickup truck were not involved in the criminal case's finding that the seizures were lawful and so were excluded from the reach of the collateral estoppel doctrine. But the government concedes error as to those items, which must therefore be returned to Lauchli.

After the district court rendered its forfeiture opinion herein, the Supreme Court decided United States v. Bass, 404 U.S. 336, construing 18 U.S.C. App. sec. 1202(a) to require proof of receipt or possession of a firearm in interstate commerce or affecting commerce as part of that offense. The Government admits that it did not attempt to prove that Lauchli's possession of any weapons affected commerce, so that any forfeiture based on a violation of Section 1202(a) cannot stand. However, in its forfeiture opinion,

[3] Because of the applicability of the collateral estoppel doctrine, we do not consider the Government's alternative argument that an illegal seizure does not preclude forfeiture of the property seized. See Dodge v. United States, 272 U.S. 530.

the district court mentioned Section 1202(a) as only one of the three statutes violated by Lauchli.[4] The other statutory violations mentioned in its opinion support these forfeitures under 18 U.S.C. §924(d) and 26 U.S.C. §§5872 and 7302. Therefore, the reference to 18 U.S.C. App. §1202 (a) in the forfeiture opinion will be treated as surplusage.

Although Lauchli's application to proceed in forma pauperis in the district court was never adjudicated formally, he was permitted to proceed without payment of fees and costs or the giving of security, which was exactly what he requested[5]. Although then a federal prisoner, he was also permitted to be present at the forfeiture hearing. Until after the trial, he did not request the district court to appoint counsel, nor did he advise the district court that he needed some specific absent witnesses. It is unclear how any witnesses could have aided his case, and he has not told us how they could. Thus his claim that the district court's failure formally to rule on his application prejudiced him by making unobtainable witnesses and the assistance of counsel rings hollow. Moreover, at the outset of the trial, Lauchli said he was ready to proceed, so that any error in not formally ruling on his application to proceed in forma pauperis must be deemed waived.

[4] The others were 18 U.S.C. §922(a)(1) and 26 U.S.C. §5861. The indictment in United States v. Lauchli, supra, included them but did not charge a violation of 18 U.S.C. App. §1202(a).

[5] Lauchli's application was entitled, "Application to Proceed Without Prepayment of Fees or Costs or the Giving of Security Therefor." It did not request the appointment of counsel.

Additionally, Lauchli asserts personal prejudice on the part of the trial judge. No affidavit of bias or prejudice was filed as required by 28 U.S.C. §144. Securities and Exchange Comm. v. Bartlett 422 F. 2d 475, 480 (8th Cir. 1970). The first complaint about the district judge's attitude occurred in a post-trial brief, even though Lauchli had the information on which he relied three weeks before the conclusion of the trial. His preferred explanation for the delay--that he "had to check the bonafides of the statement"--is not a sufficient excuse for failing to act until the end of the trial. Not only was the matter waived, but the claim of prejudice is insubstantial. For example, Lauchli refers to the district judge as a former official of the Treasury Department, whereas the record shows that in truth he served only as a war bond chairman in World War II. The alleged colloquy between the trial judge and the deputy marshal occurred in the middle of the forfeiture trial. Even if their words were accurately reported, they do not show that the district judge would be guided by prejudice rather than the legal merits or was certain to rule against Lauchli when the trial was completed. We are unwilling to make that assumption in view of the judge's long record for fairness. Lauchli overlooks the fact that this same judge reduced his sentence in United States v. Lauchli, supra from 12 years to 8 years in order to make him eligible for parole. Furthermore, even the judgment here assailed awarded him some relief. Insofar as it may be contended that the judge was predisposed by considerations of societal safety not to release the guns ordered forfeited, it may be noted that the judge awarded 43 weapons, purchased by Lauchli, to his wife even though the judge found that Lauchli had offered to sell various of these weapons to an undercover Treasury agent.

Finally, we considered the other errors claimed by Lauchli and conclude they are without merit, as in the case of some of them we have once before concluded in the appeal of his criminal conviction. However, the Government is directed to return to Lauchli instanter his two typewriters and the 45 machine gun stock covers and 80 screws found in his father's truck. The Government should also return forthwith the documents described in the last paragraph of p. 13 of Lauchli's principal brief if, as represented to us by appellant (br.46), it previously agreed to do so.

Judgment affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois

Heard April 9, 1973

June 7, 1973

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

RICHARD A. LAUCHLI, JR., Appellant,	)	Appeal from the United States District Court for the Southern District of Illinois, Southern Division.
No. 72-1355 vs.	)	
UNITED STATES OF AMERICA, Appellee	)	Misc. No. 71-38
	)	Omer Poos, Judge

O R D E R

This action arose on plaintiff's application to proceed in forma pauperis and motion for return of three firearms and a machine gun barrel allegedly seized from his Collinsville, Illinois home by two Treasury Agents just after they arrested Lauchli outside his home for asserted violations of the National Firearms Act

(26 U.S.C. §5801-5871)[1]. Without filing an opinion, the district court denied Lauchli's motion for return of the property. The Government's defense in the district court and here is that the action is barred by the 6-year statute of limitations contained in 28 U.S.C. §2401(a)[2]

The property in question was seized by Treasury Agents in June 1965, which was more than six years before the filing of the action on July 28, 1971. The Government concedes that the property "apparently was in no way connected to the offense for which he (Lauchli) was arrested." See Lauchli v. United States, 402 F. 2d 455 (8th Cir. 1968.) According to plaintiff, the Government attempted but failed to obtain an indictment against him in connection with the confiscated firearms and machine gun barrel. This property was not the subject of any forfeiture proceeding.

[1]Although plaintiff's motion for return of property was apparently brought pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, in this court he specifically disavows reliance on it. Rule 41(e) would not have applied, and in substance plaintiff's action can only be considered as a wholly independent action in the nature of replevin. United States v. Butler, 299 F. Supp. 779 (D. Mass. 1969), and cases cited therein.

[2]In pertinent part, this Section provides as follows: "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability ... at the time the claim accrues may be commenced within three years after the disability ceases."

In this posture we think plaintiff's cause of action was in the nature of replevin (Bartlett v. United States, 317 F. 2d 71 (9th Cir. 1963), certiorari denied, 375 U.S. 861; United States v. Butler, 299 F. Supp. 779 (D. Mass. 1969)) and that it accrued when the property was seized[3]. Thus we hold that the action was barred by the 6-year statute of limitations. To avoid such a holding, Lauchli asserts that he was incarcerated in the United States Penitentiary and therefore under a legal disability extending the period of the statutes of limitations. However, in view of his known litigiousness during incarceration, we take judicial notice that Lauchli did not suffer any disability that prevented him from filing suits in federal courts. This limitation statute is to be strictly construed (Mohf v. United States, 302 F. Supp. 356, 360 (N.D. Ill. 1969)), and Lauchli has not persuaded us that he comes within the tolling exception thereto.

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[3]Had an administrative forfeiture proceeding been instituted, plaintiff would have been required to petition for remission of forfeiture under 26 U.S.C. §7325. See United States v. Decker, 322 F. Supp. 419 (W.D. Mo. 1970). It unnecessary to decide whether in the absence of such proceedings the filing of a petition with the Secretary of the Treasury is a precondition for the maintenance of this action. See 26 C.F.R. § 172.36. Plaintiff did not file such an administrative claim, and therefore no question of tolling during its pendency is presented.

Finally, Laschli complains of bias of the district judge. However, no affidavit of bias and prejudice was timely filed below as required by 28 U.S.C. §144. Furthermore, in other proceedings the district judge displayed his lack of prejudice by reducing Laschli's sentence and by ordering seized property returned to him. Since the merits of this action are not to be reached, his reliance on United States v. United States Coin & Currency, 401 U. S. 715, is misplaced.

Order affirmed.

The only such affidavit was filed in this Court on September 28, 1971.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard April 9, 1973

July 6, 1973

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

RICHARD A. LAUCHLI, JR., Petitioner-Appellant,
No. 72-1401 vs.
UNITED STATES OF AMERICA, Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.
Civil 4784
Omer Poos, Judge

O R D E R

This is an appeal from the denial of a motion for relief under 28 U.S.C. § 2255 or by writ of habeas corpus.

Appellant first alleges that the district judge was prejudiced against him and therefore decided not to give appellant "the relief to which he is entitled" herein. No affidavit of bias and prejudice was filed in the district court under 28 U.S.C. §144. The motion filed below obliquely stated in a paragraph complaining of "incompetent counsel" that appellant's previous trial under the National and Federal Firearms Acts (see United States v. Lauchli, 371 F. 2d 303 (7th Circ. 1966) had been

before a "complaisant, biased or eccentric judge" (a. 16).* For failure to comply with 28 U.S.C. § 144, this claim must fail. Furthermore, as stated in our related orders in Nos. 72-1251 and 72-1355, the claim is without merit.

Next appellant urged that the indictment involved in United States v. Lauchli, supra, should be dismissed because of unnecessary judicial delays herein and in our No. 72-1247, also decided this day. However, the district court finally disposed of both these collateral attacks on his conviction in January 1972 and March 1972 when Lauchli was still incarcerated by virtue of a separate conviction. With respect to No. 72-1247, the district court held evidentiary hearings on March 18 and March 25, 1971, pursuant to our remand in Lauchli v. United States, 432 F. 2d 1207 (7th Cir. 1970). Lauchli has not shown what witnesses, if any, were lost to him or how their memory may have been

* Appellant's sworn application to the district court for leave to appeal in forma pauperis merely contained a conclusory reference to "The prejudice of the presiding judge." This belated affidavit did not contain the facts and reasons for the belief that bias or prejudice exists "or show good cause for failure to file it earlier." as required by 28 U.S.C. § 144.

impaired in the proceedings conducted on those dates. With respect to the instant petition, no hearing was necessary for disposition, as explained below. While judicial delay in finally disposing of his collateral attack petitions is regrettable, appellant has shown no prejudice by the passage of time entitling him to a dismissal of the indictment on which he was properly convicted. And there is absolutely nothing to support appellant's bald assertion that the judicial delay was deliberate.

Finally, appellant urges that the district court should have expanded the hearing involved in our No. 72-1247 to include issues besides the three we remanded in Lauchli v. United States, 432 F. 2d 1207 (7th Cir. 1970). However, an examination of the thirteen issues presented by appellant's motion therein shows that they were legal questions not necessitating an evidentiary hearing. They were adequately answered in the Government's January 7, 1972, response to appellant's instant motion.

Affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard April 9, 1973
July 6, 1973

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNITED STATES OF AMERICA, Libellant-Appellee, vs. SUNDRY FIREARMS, ETC. Libellees, APPEAL OF RICHARD A. LAUCHLI, Appellant.	Appeal from the United States District Court for the Southern District of Illinois. Civil Nos. 3633 and 3634. Robert D. Morgan, Judge
No 72-1433	

ORDER

In these consolidated actions, the United States sought forfeiture of machine guns and parts, a 1964 Pontiac, $17,000 in currency and various rifles, pistols and firearms parts and ammunition seized at the time of appellant Lauchli's May 19, 1964 arrest for alleged violations of federal firearms laws, resulting in his 1965 conviction. See United States v. Lauchli, 371 F. 2d 303 (7th Cir. 1966).

The 1964 Pontiac was forfeited by stipulation of the parties. The district court found that it had been used by appellant to transport firearms parts to a farm near Wapella, Illinois, where

he sold 100 or more Thompson machine guns and seven Browning machine guns and other firearms and other firearms and ammunition to "General Joseph Camillo," actually a Treasury Department undercover agent, for $17,000 in currency whose serial numbers were pre-recorded by the Government. On that date, government investigators seized the Pontiac near Wapella. The Pontiac contained said currency as well as firearms, and firearm parts, ammunition and miscellaneous property, all of which was the subject of the forfeiture proceeding. On the same date, investigators seized machine guns, other firearms, firearms parts and ammunition in appellant's Lomco Machine Shop adjoining his Collinsville, Illinois, residence. This property was also the subject of the forfeiture action.

After hearing testimony of appellant and others, the district court entered appropriate findings of fact describing the events of May 19, 1964. (See United States v. Lauchli, supra.) The court's conclusions of law were that all the aforesaid property (apart from the Pontiac that had already been forfeited pursuant to stipulation) was possessed by appellant on May 19, 1964, and was "used and intended to be used in violation of the National Firearms Act (26 U.S.C. § 5801 et seq.) and of the Federal Firearms Act (15 U.S.C. §901 et seq.)". Accordingly, forfeiture to the United States was ordered pursuant to 26 U.S.C. §§ 5862 and 7302 and 15 U.S.C. § 905. We affirm.

In United States v. United States Coin & Currency, 401 U. S. 715, our application of the Fifth Amendment privilege against self-incrimination was approved as a defense to a forfeiture action. However, as demonstrated in our No. 72-1247, decided this day, appellant's Fifth Amendment rights were not violated by his conviction under the National Firearms Act of 1934. In any event, the

forfeitures herein were also predicated on the Federal Firearms Act of 1938, and appellant's Fifth Amendment claims have not affected the counts of which he was convicted under the Act. Leuchi v. United States, 432 F. 2d 1207, 1208 (7th Cir. 1970). His conviction on the Federal Firearms Act counts remains valid in all respects. The forfeitures were proper.*

Judgment affirmed.

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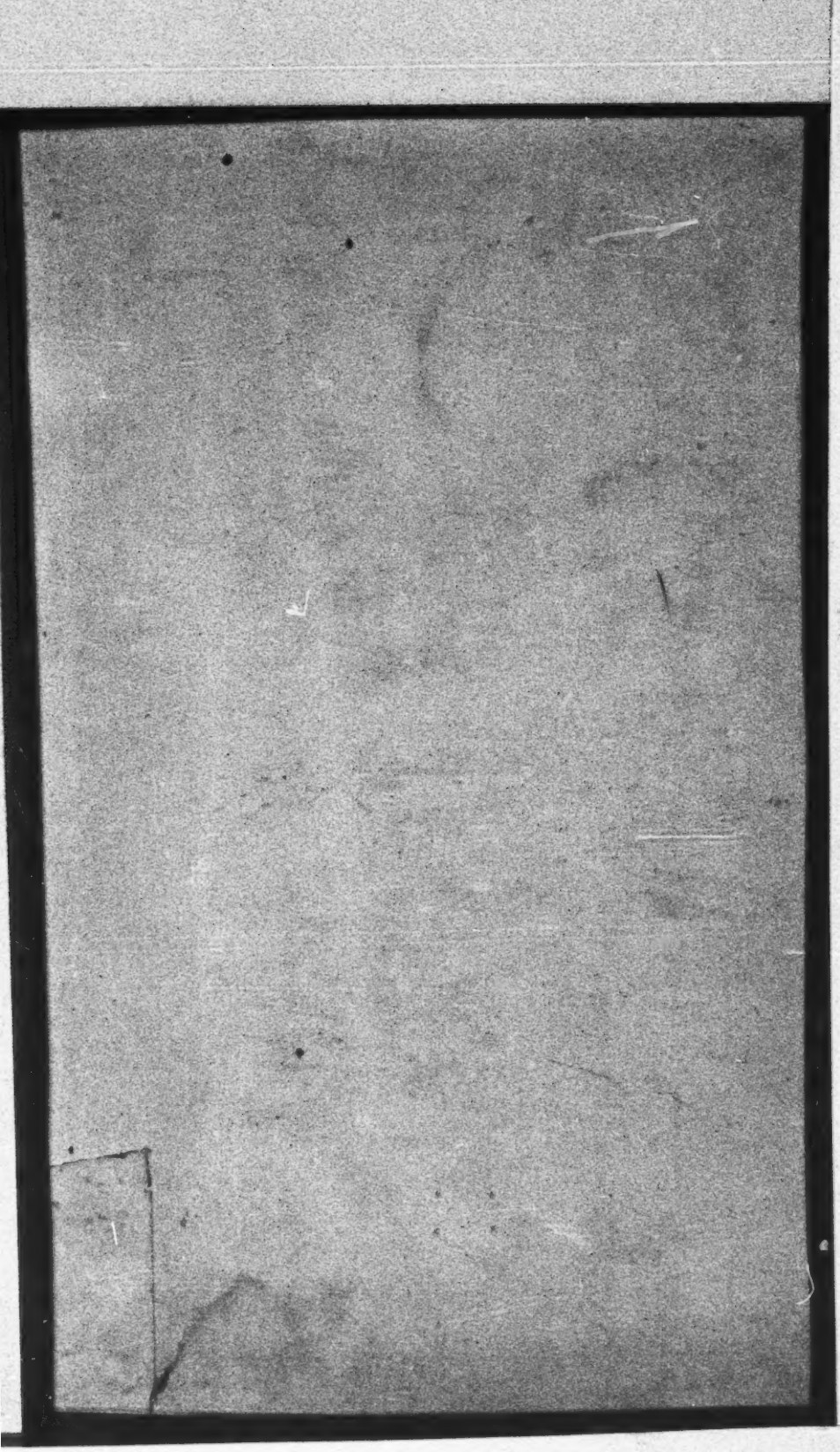
*In view of our holding, we do not reach several suggested alternative reasons, not passed upon below, why appellant is not entitled to the return of the property, to wit: (1) appellant never acquired any right to the $17,000 in government-supplied currency, (2) as a convicted felon, he is prevented from receiving the firearms and ammunition (see 18 U.S.C. App. §1202(a) and Ill. rev. stat. ch. 38, § 24-3.1(3) (1973), and (3) the unregistered firearms are contraband per se which no one is entitled to recover (see United States v. Jeffers, 342 U.S. 48, 53).



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No. 73-407

In the Supreme Court of the United States

OCTOBER TERM, 1973

RICHARD A. LAUCHLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-407

RICHARD A. LAUCHLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented by the petition include whether forfeiture of firearms as a consequence of violation of a gun control statute is barred by the Second Amendment, whether firearms and other property were seized from petitioner in violation of the Fourth Amendment, and whether the forfeitures of petitioner's property violated his Fifth Amendment privilege against self-incrimination.

This petition seeks a writ of certiorari to review five decisions of the court of appeals which held, respectively, (1) that petitioner's 1965 conviction for unlawfully dealing in and transferring firearms in violation of former 26 U.S.C. 5801, 5802, 5811, 5813 and 5814, which he attacked collaterally,[1] was not invalid

[1] Petitioner's conviction was affirmed on direct appeal. *United States* v. *Lauchli*, 371 F. 2d 303 (C.A. 7).

on the ground that compliance with the statute would have deprived him of his privilege against compulsory self-incrimination (C.A. 7, No. 72-1247, Pet. App. 1-12); (2) that petitioner could not relitigate in a forfeiture proceeding the legality of a seizure which had previously been held lawful in a criminal prosecution, and otherwise upholding the legality of a forfeiture growing out of his 1969 conviction for violation of 18 U.S.C. 922 and 923 and 26 U.S.C. 5801, 5802, 5812, 5841, 5842, 5845, and 5861 (C.A. 7, No. 72-1251, Pet. App. 13-18);[2] (3) that a motion filed on July 28, 1971, for return of firearms seized in June 1965 was an action in the nature of replevin, which was barred by the six year statute of limitations contained in 28 U.S.C. 2401(a) (C.A. 7, No. 72-1355, Pet. App. 19-22); (4) that petitioner's further collateral attack upon his 1965 conviction on grounds of bias on the part of the trial judge, unnecessary judicial delay in disposing of his collateral attacks, and failure to grant him an evidentiary hearing on thirteen legal issues which he raised collaterally was without merit (C.A. 7, No. 72-1401, Pet. App. 23-25); and (5) that the forfeitures growing out of petitioner's 1965 conviction were not invalid under *United States* v. *United States Coin & Currency*, 401 U.S. 715, both because his self-incrimination contention was without merit and because, in any event, the forfeitures rested in part upon violations of a statute to which the self-incrimination contention was inapplicable (C.A. 7, No. 72-1433, Pet. App. 26-28).

The self-incrimination contention which petitioner raises here is fully and adequately answered in the opinions in Nos. 72-1247 (Pet. App. 1-12) and 72-1433

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[2] The conviction was affirmed in *United States* v. *Lauchli*, 444 F. 2d 1037 (C.A. 7), certiorari denied, 404 U.S. 868.

(Pet. App. 26-28), upon which we rely. His claim of unlawful seizures is fully and adequately answered in the opinions in Nos. 72-1251 (Pet. App. 13-18) and 72-1355 (Pet. App. 19-22), upon which we also rely. His Second Amendment contention was long ago rejected by this Court in *United States* v. *Miller*, 307 U.S. 174.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

(801)-1973-10